

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOE SUGRANES	:	DETERMINATION
	:	DTA NO. 818773
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1997 through February 29, 2000.	:	

Petitioner, Joe Sugranes, 80-04 151st Avenue, Howard Beach, New York 11414, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through February 29, 2000.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel), brought a motion dated January 30, 2002 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing *pro se*, filed a response to the Division of Taxation's motion on February 7, 2002, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (“Division”) is the timeliness of petitioner’s protest of a Notice of Determination dated May 18, 2001 and addressed to petitioner, Joe Sugranes, as follows:

80 04 151st Ave.
Howard Beach, NY 11414-1104

2. The subject Notice of Determination asserts \$10,741.92 in additional tax due for the period June 1, 1997 through February 29, 2000, plus penalty of \$4,179.53 and interest of \$3,660.19, for a total amount due of \$18,581.64. The notice bears certified mail control number 7104 1002 9739 0019 0692 and assessment identification number L-019435375.

3. Petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the subject Notice of Determination. The request was mailed via the United States Postal Service (“USPS”) and was addressed to “Tax Compliance Division, NYS Campus, Building 8 Rm 438, Albany, NY 12227.” As part of its motion papers, the Division submitted a photocopy of the envelope in which the request was mailed. The envelope has both a USPS postmark and a metered mail postmark. The date of the USPS postmark is partially obscured by the metered mail postmark, but appears to be August 24, 2001. The year (“2001”), month (“Aug”) and the numeral “2” in the postmark date are clearly visible; the second numeral in the date (the “4”) is partially obscured. The metered mail postmark is undated. The request is dated August 14, 2001 and was received by BCMS on September 13, 2001.

4. On September 28, 2001, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner’s protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on May 18, 2001, but the request was not mailed until August 20, 2001, or in excess of 90 days, the request is late filed.

5. Notices of determination, such as the one at issue, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

6. Each computer-generated notice of determination is pre-dated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case the CMR lists an initial date of May 8, 2001, which has been manually changed to May 18, 2001.

7. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the

envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

9. The CMR relevant to this case is a one-page, computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." This CMR lists ten certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

10. Information regarding the subject Notice of Determination is contained on the CMR. Specifically, corresponding to the certified control number listed in Finding of Fact "2" is notice number L-019435375, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination.

11. The CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated May 18, 2001.

12. At the bottom of the CMR there is a pre-printed entry of the number 10, corresponding to the heading "Total Pieces and Amounts Listed." This figure has been manually circled and below it is the signature or initials of a Postal Service employee.

13. Appearing immediately below the "total pieces" listing is the heading "Total Pieces Received at Post Office." No information appears after this heading.

14. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the “total pieces listed” figure indicate that all 10 pieces of mail listed on the CMR were received at the post office.

15. The facts set forth above in Findings of Fact “5” through “14” were established through affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of determination. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

16. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

17. The Division generally does not request, demand or retain return receipts from certified or registered mail.

18. The address on the subject Notice of Determination is the same as the address given on petitioner’s filed 2000 Resident Income Tax Return (Form IT-201), which was signed by petitioner and dated August 13, 2001. The address on the subject notice is also the same as the return address on the envelope containing the request for conciliation conference.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as [summary judgment] motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, ***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (***Daliendo v. Johnson***, *supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for

conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see*, Tax Law §§ 1138[a][1]; 170[3-a][a]).

D. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact "16").

G. The CMR also provides sufficient documentary proof to establish that the notice of determination dated May 18, 2001 was mailed as addressed on May 18, 2001. This one-page document lists 10 certified control numbers with corresponding names and addresses. There are

no deletions from this list. The CMR bears a U.S. Postal Service postmark dated May 18, 2001. Additionally, a postal employee circled the entry “10” next to the “total pieces listed” heading and signed or initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon.¹ This evidence is sufficient to establish that the Division mailed the subject notice of determination as claimed on May 18, 2001.

H. Having determined that the Division properly issued the subject notice of determination on May 18, 2001, it must now be determined whether petitioner’s request for conciliation conference was timely filed. Where an envelope containing a request bears a United States Postal Service postmark, the date of the USPS postmark is deemed the date of filing (*see*, 20 NYCRR 4000.7[a][2]). Here, the photocopy of the envelope containing petitioner’s request appears to indicate a USPS postmark dated August 24, 2001. While the numeral “4” in the date is partially obscured, the “2” in the date is not (*see*, Finding of Fact “3”). Accordingly, viewing the facts in a light most favorable to petitioner, the earliest possible postmark date would be August 20, 2001. As previously noted, a request for conciliation conference with BCMS must be filed within 90 days of the mailing of the notice of determination (*see*, Tax Law §§ 1138[a][1]; 170[3-a][a]). Ninety days from the May 18, 2001 mailing date of the subject Notice of Determination was August 16, 2001. Petitioner’s request for conciliation conference, which bears a USPS postmark dated, at the earliest, August 20, 2001, was therefore untimely.

I. In his petition, petitioner claimed that the assessment was in error and that he owed no tax for the period at issue because he did not work during that time. Because petitioner failed to file a timely protest to the subject Notice of Determination, the Division of Tax Appeals has no

¹This fact was established through the affidavit of Mr. Baisley which specifically set forth the basis of Mr. Baisley’s knowledge for this proposition (*cf.*, *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

jurisdiction over the matter and therefore may not consider the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

J. The Division of Taxation's motion for summary determination is granted; the petition of Joe Sugranes is dismissed.

DATED: Troy, New York
March 21, 2002

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE